

Protecting Corporate Officials from Personal Liability for Environmental Violations

The Responsible Corporate Official Doctrine

Freedom S.N. Smith
Donald M. Snemis



icemiller.com

Part I The Corporate Shield (and ways to break it)



icemiller.com

Environmental Laws

- Violations of state and federal environmental laws can carry both civil and criminal penalties
- Civil penalties can include fines and injunctive relief
- Criminal penalties can include both fines and imprisonment

The Corporate Shield

Generally, the existence of a business entity such as a corporation or limited liability company shields owners, shareholders, officers, and directors from personal liability for the actions and inactions of a business entity

But ... the shield can be broken

- The corporate shield does not apply in several situations, such as:
 - Personal participation in violations
 - Piercing the corporate veil a/k/a alter ego theory
 - Responsible corporate official doctrine

Personal Participation

- Corporate officers are liable for violations in which they **personally participated**, regardless of whether they were acting in the scope of their authority
- Often driven by the broad language of federal and state statutes

Example: *U.S. v. Northeastern Pharm.*

- The U.S. brought a civil suit against Northeastern Pharmaceutical and two officers for RCRA violations in Missouri
- President Edwin Michaels was found personally liable because he was directly responsible for the company's overall operations
- VP John Lee was found personally liable because he had control over hazardous waste generated by the plant and arranged for transport and disposal

Piercing the Corporate Veil

- Applies when equity requires disregarding the corporate shield to avoid an injustice
- Can apply to reach shareholders or parent companies
- State common law usually governs when the veil can be pierced

Piercing the Corporate Veil (cont.)

- Generally the issues are:
 - Complete control by an individual
 - Lack of adherence to corporate formalities
 - Insufficient corporate assets to cover liabilities
 - Use of the corporation for wrongful purposes
- A piercing theory is difficult to prove and is usually disfavored by the courts

Example: *Ohio v. Mercomp*

- The Ohio Attorney General brought an enforcement action against Mercomp based on violations of Ohio's solid waste regulations pertaining to landfills
- The AG also pursued Mercomp's sole shareholder, officer, and director, Harry Rock
- The State sought injunctive relief and penalties

Ohio v. Mercomp (cont.)

- State required to prove:
 - Control was so complete that Mercomp had no separate will, mind, or existence
 - Control exercised to commit a fraud or illegal act
 - Control resulted in injury or unjust loss
- Held: all elements were satisfied, and Rock was not protected by the corporate shield, and is personally liable for the violations

Part II

The Responsible Corporate Official Doctrine



Responsible Corporate Official Doctrine

Makes corporate officials liable even when they did not personally commit the actions prohibited by law

- **WHO:** Responsible Corporate Officer
 - Holds position of responsibility
 - Ability to prevent the violation
 - Failed to prevent the violation
- **WHAT:** strict liability
- **RAMIFICATION:** Civil or Criminal Liability

RCO – General Background

- First established by the federal courts in the FDCA context
- Applies to “public welfare” statutes
- Any corporate official in a position of responsibility who has the authority to prevent or correct a violation, and fails to do, can be liable under this doctrine
- Applies to both civil and criminal liability
- Later adopted by the states

Multiple Applications

- RCO doctrine applies to many areas of the law:
 - Food and drug
 - Environmental
 - Securities
 - Consumer fraud
 - Deceptive lending practices
 - Antitrust
 - Sarbanes-Oxley

U. S. v. Dotterweich (1943)

- The Genesis of the RCO Doctrine
- Prosecution under Federal, Food, Drug and Cosmetic Act (“FDCA”) for mislabeling
- Company purchased drugs, repackaged them, and shipped with new label. Drugs deemed “mislabeled.”
- Company not guilty, but President was guilty of a **misdemeanor** even though he did not directly participate in shipments

Dotterweich (cont.)

- President convicted on grounds of public welfare because he should have been aware of conduct
- Statute is the type of legislation that “dispenses with the conventional requirement **for criminal conduct**—awareness of some wrongdoing.
- In the interest of the larger good, it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”

Dotterweich (cont.)

- Congress has preferred to place hardship upon those who have the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers rather than to throw the hazard on the innocent public
 - **Class of responsible employees not defined.**

United States v. Park (1975)

- John Park was the president of Acme Markets Inc., a national retail food chain.
- **1970:** FDA found unsanitary conditions including rodent infestation at Acme's Philadelphia warehouse and similar conditions at Baltimore facility. Mr. Park was informed of the findings.
- **1972:** FDA still found evidence of rodent infestation.
- **Company and Park criminally charged for law violations**

Park (cont.)

- **HOLDING:** “[T]he [FDCA] imposes the highest standard of care and permits conviction of responsible corporate officials who, in light of this standard care, have the power to prevent or correct violations of its provisions” *Park*, 421 U.S. at 676
- The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question

Park (cont.)

- Government can seek convictions of a company official for violations of federal acts—even if the corporate official was unaware of the violation—if the official was in a position of authority to prevent or correct the violation and did not do so

Park (cont.)

- The Court recognized that the FDCA “does not require that which is objectively impossible.”
 - “[t]he theory upon which responsible corporate agents are held criminally accountable for ‘causing’ violations of the Act permits a claim to be raised defensively that a defendant was ‘powerless’ to prevent or correct the violation”

U.S. v. Hodges X-Ray (1985)

- Hodges X-Ray, manufacturer of X-ray machines, and its President and principal shareholder were charged with 66 violations of the Radiation Control for Health and Safety Act of 1968 (RCHSA) regarding various issues with x-ray machines.
- Government sought **civil penalties** against Company and President.
- President contested that he could not be individually liable

Hodges (cont.)

- The court applied the Responsible Corporate Official doctrine to civil liability, noting that the RCHSA was a public welfare statute
 - The rationale for application of RCO is even more persuasive where only civil liability is involved

U.S. v. DeCoster (2016, 2017)

- First case in decades to analyze the limits of the RCO Doctrine
- Quality Egg guilty of several violations for introducing contaminated eggs into commerce
- The government charged the DeCosters (the owner and the COO) individually
- They claimed they had no "actual knowledge" that the company sold contaminated eggs



icemiller.com

DeCoster (cont.)

- 8th Circuit imported blame based on failure to "prevent or remedy the conditions which give rise to the charges against [them]."
- Court noted egregious safety and sanitation procedures, ignoring results, etc.



icemiller.com

DeCoster (cont.)

- Due Process violation defense unsuccessful
 - imprisonment for a misdemeanor violation would only violate Due Process if the offense is one of "vicarious liability," *i.e.* the actionable conduct of a subordinate.
 - Corporate officer guilty because of direct "blameworthiness" for the failure to prevent or remedy an issue
- Result: DeCosters fined \$100k each and sentenced to 3 month prison terms

RCO and Indiana



U.S. v. Conservation Chem. (1987, 1989)

- EPA brought action against Conservation Chemical, which operated a hazardous waste facility, for RCRA violations
- EPI also pursued the company's president and principal stockholder, Hiersted
- **Held:** Hiersted could be personally liable under RCRA regardless of whether he himself qualified as an "operator," as long as he was actively involved in the activity causing the violation

Conservation Chem. (cont.)

- Corporate officer liability is consonant with Congressional intent under RCRA to impose liability on persons who are involved in the handling and disposal of hazardous substances.

IDEM v. RLG (2001)

- IDEM initiated an action against RLG and Lawrence Roseman, its sole corporate officer, for environmental violations related to a landfill
- Judgment entered against RLG in the amount of \$3,175,000.
- At issue was whether Roseman could be personally liable.

RLG (cont.)

- The Indiana Supreme Court adopted the Responsible Corporate Official doctrine:
 1. The individual must be in a position of responsibility which allows the person to influence corporate policies or activities
 2. There must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations
 3. The individual's actions or inactions must have facilitated the violations

RLG (cont.)

- **Held:** Roseman could be personally liable under RCO doctrine for the company's violations "whether or not the traditional doctrine of piercing the corporate veil would produce personal liability."
- Roseman's status as officer, director, or sole shareholder of RLG was not entirely determinative of liability.

RLG (cont.)

- Factors highlighted in the court's finding of liability:
 - Roseman's direction of and involvement in operating the landfill
 - Roseman was listed as responsible party in solid waste permit
 - Roseman signed documentation.

Stillwater of Crown Point v. Stiglich (2014)

- Developer sued by homeowner's association and homeowners under the Clean Water Act (CWA) claiming that the construction of road crossings over a ditch caused flooding damages
- The CWA specifically provides for criminal liability under the RCO doctrine
 - However, it does not explicitly provide for civil liability under the RCO doctrine

Stillwater (cont.)

- **Held:** the RCO doctrine extends to CWA civil liability
- Stiglich was personally liable for the cleanup and penalties because he was the only developer of the subdivision and the only corporate officer of the company responsible for permitting, construction and development of the subdivision

RCO in the Environmental Context



General Overview

- RCO applied through common law to environmental violations
 - Environmental laws inherently public welfare statutes
- Also adopted in the language of the CWA, CAA, and RCRA, and other laws and regulations that incorporate the concept of a “responsible corporate officer”
- Many environmental programs have specific certification obligations (on applications as well as reports)

Clean Air Act – An Example

Statutory Provisions

CAA § 503(c)

- “Any person required to have a permit shall . . . submit to the permitting authority a compliance plan and an application for a permit signed by a responsible official, who shall certify the accuracy of the information submitted.”

CAA § 504(c)

- “Any report required to be submitted by a permit issued to a corporation under this subchapter shall be signed by a responsible corporate official, who shall certify its accuracy.”

Regulatory Provisions

Responsible Officer: 40 CFR 70.2

- Pres., Sec., Tres., VP (principal business function); or
- Any other person who performs similar policy or decision-making functions for the corporation; or
- Duly authorized representative (under certain circumstances)

CAA - What Does the Certification Require?

“Any application form, report, or compliance certification submitted pursuant to these regulations shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this part shall state that, based on information and belief **formed after reasonable inquiry**, the statements and information in the document are true, accurate, and complete.”



AES-01
AIR EMISSION STATEMENT CERTIFICATION
State Form 52052 (3-05)
INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT



Reset Form

IDEM - Office of Air Quality
Technical Support and Modeling Section - Mail Code 61-51
 100 N. Senate Avenue
 Indianapolis, IN 46204-2251
 Telephone: (317) 233-0178 or
 Toll Free: 1-800-451-6027 x30178 (within Indiana)
<http://www.emissions.IN.gov/>

Instructions:

- This is a required form for each air emission statement as well as any modifications.
- The certification supplied with a source's permit may be used in lieu of this form
- "Responsible Official" has the same meaning as defined in 326 IAC 2-7-1 (34), and is usually designated in the General Information section of the permit.

Part A: Contact Information

Part A is intended to provide basic information about the company submitting an Air Emission Statement and information on the Air Emission Statement preparer in case there is a question about the report.

1. Company Name:	2. Source ID:
3. Mailing Address:	
Mercury and Mercury Compounds (CAS#7439976 and TRI ID N458)	

Part C: Signature of Responsible Official

I hereby certify that the information in this emission statement is accurate based on reasonable estimates using data available to the preparers and on a reasonable inquiry into records and persons responsible for the operation of the source, and is true, accurate, and complete.

Name of Responsible Official (typed or printed)	Title of Responsible Official
Signature of Responsible Official	Date (month, day, year)



icemiller.com

Clean Water Act

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."



**Indiana Discharge Monitoring Report Form 30530
MONTHLY MONITORING REPORT (MMR) FOR NPDES DISCHARGE PERMITS**

FACILITY NAME AND ADDRESS:

TEST FACILITY
100 NORTH SENATE AVENUE
ROOM 1255
INDIANAPOLIS, IN 46204

PLEASE COMPLETE AND SUBMIT ONE COPY EACH MONTH.
THIS REPORT MUST BE POSTMARKED NO LATER THAN THE
25TH OF THE FOLLOWING MONTH.

Mail To: Indiana Dept. of Environmental Management
Office of Water Quality, Mail Code 65-42
100 North Senate Ave.
Indianapolis, Indiana 46204-2251

I N P 0 0 0 9 2 4 9 0 0 1 A 0 6 0 5

EFFLUENT CHARACTERISTICS	COPPER, TOTAL		IRON, TOTAL		LEAD, TOTAL REC		ZINC, TOTAL REC	
	Q 01042	C 01042	Q 01045	C 01045	Q 01114	C 01114	Q 01094	C 01094
EFFLUENT PARAMETER NUMBER	COMP24	COMP24	COMP24	COMP24	COMP24	COMP24	COMP24	COMP24
SAMPLE TYPE	Permit Condition	COMP24	COMP24	COMP24	COMP24	COMP24	COMP24	COMP24
	Monitored	COMP24	COMP24	COMP24	COMP24	COMP24	COMP24	COMP24
FREQUENCY	01/07	01/07	05/WK	05/WK	02/30	02/30	03/07	03/07
	Monitored	06/07	06/07	05/07	05/07	03/30	03/30	03/07

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

John P. Doe 7/17/2005
(SIGNATURE OF CERTIFIED OPERATOR) DATE

(999) 999-9999 99999
PHONE NO. CERTIFICATION NO.

Mary Jane Doe 7/18/2005
(SIGNATURE OF PRINCIPAL EXECUTIVE OFFICER OR AUTHORIZED AGENT) DATE

Page 2 of 3



icemiller.com



**RULE 6 INDUSTRIAL STORM WATER
GENERAL PERMIT – STORM WATER
DISCHARGE MONITORING REPORT**
State Form 53590 (R/12-09)

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
Rule 6 Coordinator
100 North Senate Avenue,
Mail Code 65-42, Room 1255
Indianapolis, IN 46204-2251
Telephone (317) 233-0202
Toll free (800) 451-6027 (within Indiana), ext. 30202
www.idem.IN.gov

Web Access: www.IN.gov/idem/4901.htm

MONITORING REQUIREMENTS

- **YEAR ONE (1)** - 327 IAC 15-6-7.3 This form must be submitted within one (1) year of the original or renewal NOI letter submittal and prior to implementation of the "Storm Water Pollution Prevention Plan." A permitted facility shall sample and analyze the discharge from the outfall(s) identified in the approved NOI letter.
- **YEARS TWO (2) through Five (5)** - Subsequent annual sampling data shall be provided no later than three hundred sixty-five (365) days from submittal of the previous report in years Two (2) through Five (5).
- There should be a minimum of at least three (3) months between reported sampling events.
- Samples shall be taken from a storm event. Run-off resulting from snow or ice melt should not be used to meet the annual monitoring requirements.
- Attachments - Submit a complete copy of the laboratory report, including chain-of-custody.
- Please submit this form and attachments to IDEM at the address in the box in the upper right hand corner of this form within thirty (30) days after laboratory analyses have been completed.

PART A: PERMIT INFORMATION

1. Facility permit number 2. Facility name

PART E: CERTIFICATION STATEMENT

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature of responsible corporate officer or duly authorized representative under 327 IAC 15-4-2(g)

Signature _____ Date (month, day, year) _____



icemiller.com

RCRA

“I certify under penalty of law that this document and all attachments were prepared under my direction or supervision according to a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

EPCRA

- Tier I and Tier II
Chemical Inventory Reporting
 - Inventory Reporting to SERC, LEPC, and Fire Department
 - Certification by “Owner or Operator” or “Officially Designated Representative”

Check if information below is identical to the information submitted last year. **Reporting Period:** January 1 to December 31, 20__

Tier One Emergency and Hazardous Chemical Inventory Aggregate Information by Hazard Type		For Official Use Only State ID #: Date Received:
Facility Identification		
Name	Maximum No. of Occupants:	<input type="checkbox"/> Manned
	<input type="checkbox"/> N/A	<input type="checkbox"/> Unmanned
Street	County	City State Zip
Latitude	Longitude	NAICS Code Phone Number (optional) ()
Dun & Bradstreet Number	TRI Facility ID:	RMP Facility ID:
	<input type="checkbox"/> N/A	<input type="checkbox"/> N/A
Certification: (Read and sign after completing all sections)		
I certify under penalty of law that I have personally examined and am familiar with the information submitted in pages 1 through ____, and that based on my inquiry of those individuals responsible for obtaining the information, I believe that the submitted information is true, accurate and complete.		
Name and official title of owner/operator OR owner/operator's authorized representative	Signature	Date signed
The public reporting and recordkeeping burden for this collection of information is estimated to range from 10 to 120 hours per response. Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, Collection Strategies Division, U.S. Environmental Protection Agency (2822T), 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Include the OMB control number in any correspondence. Do not send the completed form to this address.		

EPA Form No. 8700-29 OMB Control No. 2050-0072 Page 1 of __
Expiration Date: 12/31/2018

IceMiller
LEGAL COUNSEL icemiller.com

Check if information below is identical to the information submitted last year. **Reporting Period:** January 1 to December 31, 20__

Tier Two Emergency and Hazardous Chemical Inventory Specific Information by Chemical		For Official Use Only State ID #: Date Received:																																										
Facility Identification																																												
Name	Maximum No. of Occupants:	<input type="checkbox"/> Manned <input type="checkbox"/> Unmanned																																										
	<input type="checkbox"/> N/A																																											
Street	County	City State Zip																																										
Latitude	Longitude	NAICS Code Phone Number (optional) ()																																										
Dun & Bradstreet Number	TRI Facility ID:	RMP Facility ID:																																										
	<input type="checkbox"/> N/A	<input type="checkbox"/> N/A																																										
Subject to Emergency Planning under Section 302 of EPCRA (40 CFR part 355)? <input type="checkbox"/> Yes <input type="checkbox"/> No																																												
Subject to Chemical Accident Prevention under Section 112(r) of CAA (40 CFR part 68, Risk Management Program)? <input type="checkbox"/> Yes <input type="checkbox"/> No																																												
Owner or Operator Information		Parent Company Information (optional)																																										
Certification (Read and sign after completing all sections)		Reporting Ranges Weight Range in pounds																																										
I certify under penalty of law that I have personally examined and am familiar with the information submitted in pages one through ____, and that based on my inquiry of those individuals responsible for obtaining the information, I believe that the submitted information is true, accurate and complete.		<table border="1"> <thead> <tr> <th>Range Code</th> <th>From</th> <th>To</th> </tr> </thead> <tbody> <tr><td>01</td><td>0</td><td>99</td></tr> <tr><td>02</td><td>100</td><td>499</td></tr> <tr><td>03</td><td>500</td><td>999</td></tr> <tr><td>04</td><td>1,000</td><td>4,999</td></tr> <tr><td>05</td><td>5,000</td><td>9,999</td></tr> <tr><td>06</td><td>10,000</td><td>24,999</td></tr> <tr><td>07</td><td>25,000</td><td>49,999</td></tr> <tr><td>08</td><td>50,000</td><td>74,999</td></tr> <tr><td>09</td><td>75,000</td><td>99,999</td></tr> <tr><td>10</td><td>100,000</td><td>499,999</td></tr> <tr><td>11</td><td>500,000</td><td>999,999</td></tr> <tr><td>12</td><td>1,000,000</td><td>9,999,999</td></tr> <tr><td>13</td><td>10,000,000</td><td>Greater than 10 million</td></tr> </tbody> </table>	Range Code	From	To	01	0	99	02	100	499	03	500	999	04	1,000	4,999	05	5,000	9,999	06	10,000	24,999	07	25,000	49,999	08	50,000	74,999	09	75,000	99,999	10	100,000	499,999	11	500,000	999,999	12	1,000,000	9,999,999	13	10,000,000	Greater than 10 million
Range Code	From	To																																										
01	0	99																																										
02	100	499																																										
03	500	999																																										
04	1,000	4,999																																										
05	5,000	9,999																																										
06	10,000	24,999																																										
07	25,000	49,999																																										
08	50,000	74,999																																										
09	75,000	99,999																																										
10	100,000	499,999																																										
11	500,000	999,999																																										
12	1,000,000	9,999,999																																										
13	10,000,000	Greater than 10 million																																										
Name and official title of owner/operator OR owner/operator's authorized representative	Signature	Date Signed																																										
The public reporting and recordkeeping burden for this collection of information is estimated to range from 6 to 120 hours per response. Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, Collection Strategies Division, U.S. Environmental Protection Agency (2822T), 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Include the OMB control number in any correspondence. Do not send the completed form to this address.																																												

EPA Form No. 8700-30 OMB Control No. 2050-0072 Page 1 of __
Expiration Date: 12/31/2018

IceMiller
LEGAL COUNSEL icemiller.com

EPCRA – Toxic Release Inventory (TRI)

Signature of a senior management official certifying the following: “I hereby certify that I have reviewed the attached documents and, to the best of my knowledge and belief, the submitted information is true and complete and that amounts and values in this report are accurate based upon reasonable estimates using data available to the preparer of the report.”

OTHER CERTIFICATION EXAMPLES



USED OIL MANAGEMENT REPORT
 State Form 52392 (R/9-07)
 Indiana Department of Environmental Management

COUNTY: _____

**FORM
 UO**

RCRA ID _____ REPORT YEAR _____

NAME _____

LOCATION ADDRESS: _____

Comments _____

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to ensure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties under IC13-30-6-2 and Section 3008 of the Resource Conservation and Recovery Act for submitting false information, including the possibility of fine and imprisonment for knowing violations."

First Name: _____ Last Name: _____ Title: _____

Phone #: _____ E-mail: _____

Signature _____ Date _____

(This form must be printed, signed, and sent in hard copy)



icemiller.com



**CONFINED FEEDING OPERATION
 FACILITY CHANGE NOTIFICATION**
 State Form 52209 (R/7-3-16)

INDIANA DEPARTMENT OF
 ENVIRONMENTAL MANAGEMENT
 Confined Feeding Section
 Office of Laine Quigg
 100 North Senate Avenue
 MC 66-06, ICCN 1101
 Indianapolis, Indiana 46204
 (800) 451-6027 extension 2-4473

INSTRUCTIONS: For Facility Change Notifications, complete all required sections, sign, date, and return this form to the address above. Please include an updated Farmstead Plan and Facility Detail Sheet (see sections IV, V & VI). The Facility Change Notification needs to be signed and submitted by the Owner/Operator.

I. GENERAL INFORMATION FOR CURRENT APPROVAL

Farm ID Number (Log Number):	Approval Number:	AW:
Date of Last Approval (month, day, year):	County of Operation:	
Name of Operation:		
Location of Operation (nearest crossroads or mailing address):		

If any of the above information is unknown, contact IDEM at 317/232-4473.

A. CURRENT PERMIT HOLDER (APPLICANT)

The Current Permit Holder (Applicant) is the Owner/Operator that applies for or has received a CFO Approval under 327 IAC 19, including renewals and amendments. An Applicant may be an individual, a partnership, a co-partnership, a firm, a company or any other entity listed under IC 13-13-2-158(b). There may be more than one entity that constitutes an Owner/Operator. Each entity that meets the definition of Owner/Operator for the CFO must submit the requested information below.

Name: _____
 Mailing Address: _____
 City: _____
 State: _____ ZIP Code: _____
 Telephone: () _____ E-mail Address: _____

*A limited liability company (LLC) or corporation (Inc. or Corp.) or other entity required to be registered must have a current registration with the Indiana Secretary of State.

B. PROPERTY OWNER
 Same as Applicant

III. SIGNATURE

I affirm that the information on this form is, to the best of my knowledge and belief, true, complete and accurate. I am aware of the penalties for knowingly submitting false information under IC 13-30-10-1.5.

Signature of Owner/Operator: _____ Date: _____
 (month, day, year)



.com

Part III

Environmental Crimes



IceMiller[®]
LEGAL COUNSEL

icemiller.com

Negligent? Intentional? **Whatever.**

The **negligent** violation of environmental laws can result in **criminal** penalties.

IceMiller[®]
LEGAL COUNSEL

icemiller.com

Clean Air Act

Fine or imprisonment for any person who “**negligently releases**” any hazardous air pollutant or any extremely hazardous substance and who at the time “**negligently places another person in imminent danger of death or serious bodily injury.**”

Example: *U.S. v. Keough*

- Patrick Keough’s Nebraska company manufactured fiberglass animals that used Hazardous Air Pollutant (HAP) paints
- He operated without a permit and without installing required filters to control emissions
- Sentence: 6 months imprisonment and 1 year of supervised release for causing the “negligent and unlawful” release of HAPs and “negligently” placing others in danger

Clean Water Act

Fine or imprisonment for any person who “**negligently violates**” the law, a permit condition, or any pretreatment program requirement or “**negligently introduces**” a pollutant or hazardous substance into a sewer system or POTW when they “*knew or reasonably should have known*” it could cause personal injury, property damage, or a permit violation



icemiller.com

Example: *U.S. v. Freedom Ind.*

- January 9, 2014 chemical leak from Freedom Industries on the Elk River in West Virginia
- Contaminated the Charleston water supply
- President Gary Southern pled guilty to negligently discharging a pollutant and negligently violating an environmental permit
- Sentence: 1 month in federal prison, 6 months supervised release, and a \$20,000 fine
- 6 others also sentenced



icemiller.com

Example: *U.S. v. Pruett*

- Jeffrey Pruett and his companies owned and operated wastewater treatment facilities in Louisiana
- Inspectors found a failure to maintain monitoring results, discharges in excess of limits, and unpermitted discharges
- **Held:** CWA “requires only proof of ordinary negligence” to support a criminal violation
- Sentence: 21 months prison plus \$310,000 fine

RCRA

Any person who **knowingly** transports, treats, stores or disposes of hazardous waste, violates a hazardous waste permit or omits information or makes a false representation regarding hazardous waste is subject to criminal fines and imprisonment

RCRA (cont.)

- “Knowing”
 - Conduct: if actor is aware of the nature of the conduct
 - Circumstance: if actor is aware or believes the circumstance exists
 - Result: if the actor is aware or believes that the conduct is substantially certain to cause danger of death or serious bodily injury

Example: *U.S. v. Johnson & Towers*

- Foreman Jack Hopkins and trucking department manager Peter Angel indicted for RCRA violations when they allowed waste chemicals to be pumped into a trench flowing into a tributary of the Delaware River in New Jersey
- **Held:** per the language of RCRA, even the employees who were not owners or operators, and who were not in a position to secure permits can be liable under RCRA's criminal provisions

RCRA (cont.)

- Courts are split on what “knowingly” means
 - Some: defendant must have known a permit was required and that the company had no permit
 - Others: defendants must have known the waste was hazardous or harmful
- Because of the broad language of RCRA that encompasses all “persons,” resort to the responsible corporate official doctrine is often unnecessary
- The “person” must simply be involved in the violation



icemiller.com

Example: *U.S. v. Dee*

- Defendants were civilian employees of the Army and department heads responsible for a chemical research, development, and engineering center
- U.S. alleged permit violations for improperly storing, treating, and disposing of hazardous wastes
- Held: government need not prove defendants knew the violations were a crime, or that the regulations treated the substances as hazardous
- Sentence: 1,000 hours of community service, prison time suspended



icemiller.com

In Summary...

“[T]he Clean Water Act (“CWA”) and the Resource Conservation and Recovery Act (“RCRA”) both permit the imposition of penalties, **even criminal penalties**, against individuals **merely because they are in positions of authority at polluting companies.**”

-Humboldt Baykeeper v. Simpson Timber Company (N.D. Cal. 2006)



icemiller.com

Other Environmental Laws with Criminal Penalties

- CERCLA/SARA
- Rivers & Harbors Act
- Migratory Bird Treaty Act
- Endangered Species Act
- EPCRA
- Federal Insecticide, Fungicide & Rodenticide Act



icemiller.com

Other Criminal Statutes

- Aiding and abetting (18 U.S.C. § 2)
- Conspiracy to commit a federal crime (18 U.S.C. § 371)
- Mail Fraud (18 U.S.C. § 1341)
- Obstruction of judicial proceedings (18 U.S.C. § 1503)

Other Criminal Statutes (cont.)

- Obstruction of administrative proceedings (18 U.S.C. § 1505)
- Making false statements or concealing information in any matter within federal jurisdiction (18 USC § 1001)

Example – *U.S. v. Greuling*

- William Greuling was the president of El Paso Plating Works and owned 30% of its stock.
- Despite years of warnings, the company continued to discharge wastewater into the city's sewer system in violation of the CWA
- Greuling and a company VP were charged with aiding and abetting the CWA violations

U.S. v. Greuling (cont.)

- Greuling argued that he was not guilty because he did not personally participate in the discharges
- The government showed that Greuling knew of the discharges, knew that conditions at the facility were poor, had the authority to make changes, but refused to authorize expenditures to upgrade the pollution control systems
- Sentence: 24 months imprisonment plus a \$5,000 fine

U.S. Attorney's Manual

- “Provable **individual** culpability should be pursued, particularly if it relates to **high-level corporate officers**.”
- A factor to be considered when deciding whether to bring charges or negotiate a plea is “any efforts to implement an **effective corporate compliance program** or to improve an existing one.”
- But: the existence of a compliance program is not enough, by itself, to avoid criminal charges

Part IV Enforcement Trends



EPA Civil Enforcement Actions

Year	Injunctive Relief	Civil Penalties	Supplemental Environmental Projects
FY2016	\$13.7 Billion	\$5.8 Billion ²	\$32 Million
FY2015	\$7.64 Billion	\$207 Million	\$39
FY2014	\$10 Billion	\$101 Million	\$17 Million
FY2013	\$8 Billion	\$1.115 Billion ¹	\$23 Million
FY2012	\$10 Billion	\$217 Million	\$45 Million

¹ Accounts for significant penalties associated with BP's Deep Water Horizon Oil Spill Event

² Accounts for \$5.6 billion Clean Water Act penalty associated with BP's Deep Water Horizon Oil Spill Event



icemiller.com

EPA Criminal Enforcement Actions

Year	# of New Cases Filed	Criminal Penalties	Years of Incarceration
FY2016	170 Cases (184 Defendants charged)	\$207 Million	93 Years
FY2015	213 Cases	\$200 Million	129 Years
FY2014	271 Cases	\$63 Million	155 Years
FY2013	297 Cases	\$1.5 Billion ¹	161 years
FY2012	320 Cases	\$44 Million	79 Years

¹ Accounts for significant penalties associated with BP's Deep Water Horizon Oil Spill Event

- EPA generally claims a 95% conviction rate for environmental crimes
- OSHA investigations moved into DOJ Environmental section



icemiller.com

The Yates Memo

- September 9, 2015 memo from Deputy Attorney General Sally Yates entitled “Individual Accountability for Corporate Wrongdoing”
 - *“One of the most important ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”*
 - Applies to both criminal and civil corporate investigations

The Yates Memo (cont.)

- In order to qualify for cooperation credit, corporations must provide information on the individuals responsible for misconduct
- Civil and criminal investigations should focus on individuals from the start
- Absent extraordinary circumstances, DOJ will not release culpable individuals when resolving a matter with a corporation

“You should also know that counsel for the company is not required to serve up someone to take the fall in order for the corporation to get cooperation credit – a hypothetical person sometimes referred to as the “vice president in charge of going to jail.” Our goal is not to collect corporate heads.”

Deputy Attorney General Sally Yates,
*speaking at New York City Bar Association White Collar
Crime Conference 5/10/2016*



icemiller.com

Current Administration

- Speaking to the [Ethics and Compliance Initiative Annual Conference on April 24, 2017](#), attorney General Jeff Sessions remarked that:
 - The Department of Justice will continue to emphasize the importance of holding individuals accountable for corporate misconduct. It is not merely companies, but specific individuals, who break the law. We will work closely with our law enforcement partners, both here and abroad, to bring these persons to justice.



icemiller.com

Current Administration

- **9/14/2017:** Deputy Attorney General Rod Rosenstein, speaking to the Heritage Foundation:
 - "the department is reviewing the so-called Yates Memo, . . . which urged prosecutors to focus on holding individuals accountable in corporate crime cases."
 - "It is under review, and I anticipate that there may be some changes to the policy on corporate prosecutions."
- Yates Memo's emphasis on individual liability likely to be preserved in light of Sessions earlier comments

Part V

Avoiding Personal Liability



Mitigating Personal Liability

- Nothing can completely protect responsible corporate officials from the risk of personal liability
- So, the first line of defense is to avoid environmental violations altogether

Have a Compliance Program

An effective compliance program can go a long way toward protecting corporate officials from personal liability for environmental violations

- Lots of governmental guidance on what constitutes a good compliance program
 - *See: DOJ's February 2017 guidance on expectations for evaluating the adequacy of compliance programs*
- Should be industry-specific
- Should be company-specific

Tips – Compliance Programs (cont.)

- Written standards and procedures designed to prevent, detect, and respond to violations
- Procedures for assessments of effectiveness and continuous improvement
- Establish clear lines of communication
- Provides methods for employees to report violations without fear of retribution
- Compliance should share stature with other strategic business functions



icemiller.com

Tips – Compliance Programs (cont.)

- Incorporate the program through HR
 - Hiring and recruitment decisions
 - Personnel with compliance experience
 - Orientation, training, and communication
 - Evaluations
 - Promotion and compensation
 - Disciplinary actions
 - Incentives



icemiller.com

Tips – Compliance Programs (cont.)

- Top officials must:
 - Know about the program
 - Exercise reasonable oversight
 - Ensure the program is effective
 - Model commitment and good behavior
 - Encourage good conduct

Beyond the Compliance Program

Taking a few practical steps can minimize the personal liability of corporate officials, even if no compliance program exists

Know the Laws

- Identify and document all local, state and federal environmental laws that apply to your business
 - Continually update that list

Create a Culture of Compliance

- Establish and sustain a culture of compliance throughout the company
 - Lead by example
- Hire and reward employees who take compliance seriously
 - Discipline or fire employees who don't

Establish Clear Responsibilities

- Establish a clear set of responsibilities for each corporate official with regard to environmental compliance
 - Who is (and who is not) responsible for environmental compliance?
 - What is each person's responsibilities?

Choose the Right Person

- Ensure that the official responsible for environmental matters (and no one else):
 - Signs environmental reports, applications, etc.
 - Is held out as company's contact person for environmental matters

Preparing Environmental Documents

- Ensure that all documents presented to a corporate official have been fully reviewed and approved by people with the appropriate expertise

Before Signing

- Read the document fully and carefully
- Understand the technical concepts
- Understand the legal requirements
- Understand the penalties for misstatements
- Look for red flags

Before Signing (cont.)

- Ask questions and get explanations from those who prepared the document
 - It is not enough that you did not know it was false – you must conduct a reasonable inquiry
- Document your efforts

Special Purpose Entities

- Consider creating a special purpose entity to acquire businesses and properties with environmental risks

Resolving Known Issues

- Resolve known environmental issues as soon as possible
 - In many cases, the government only sought to establish personal liability after the companies failed on numerous occasions to take action on violation notices or follow through on agreed orders

Self-Report

- Self-reporting often results in reduced or even avoided penalties, especially in conjunction with regular audits

Financial Protections

- Obtain insurance coverage, including a directors and officers insurance, that covers environmental liabilities
- Put in place indemnity agreements or other provisions that protect responsible corporate officers



icemiller.com

Call Your Lawyer

- If in doubt, contact your legal department or outside counsel
- Consider separate counsel for responsible corporate officials
 - If separate counsel, enter into a joint defense agreement to protect communications and preserve privileges



icemiller.com

Part VI

Special Challenges for Small Businesses

Small Business Challenges

- In very large companies, the board and executive team are often distant enough from environmental violations (physically and by chain of command) that it can be difficult to prove authority to control.
- In small or medium-sized companies, the opposite is true.

Smaller Organizations

...may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.

Federal Sentencing Guidelines Manual

Effective Compliance Programs Guidelines Commentary



icemiller.com

Smaller Organizations, Cont'd

...may meet the requirements of this guideline [by] . . . modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.

Federal Sentencing Guidelines Manual

Effective Compliance Programs Guidelines Commentary



icemiller.com

Smaller Organizations

Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include . . . training employees through informal staff meetings.

Federal Sentencing Guidelines Manual
Effective Compliance Programs Guidelines Commentary



icemiller.com

Questions



Freedom S.N. Smith
Freedom.Smith@Icemiller.com

Donald M. Snemis
Donald.Snemis@Icemiller.com



icemiller.com

Company Confidential Copyright © 2012 Eli Lilly and Company